In The

Supreme Court of the United States

October Term, 1953
No. 56

JOSEPH GARNER and A. JOSEPH GARNER, trading as CENTRAL STORAGE & TRANSFER COMPANY,
Petitioners

v.

TEAMSTERS, CHAUFFEURS and HELPERS, LOCAL UNION No. 776 (A.F.L.), ED. LONG, President, ALLEN KLINE, Business Manager, its other officers and agents,

REPLY BRIEF FOR PETITIONERS

On Writ of Certiorari to the Supreme Court of Pennsylvania

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This limited reply brief, by way of explaining its structure and in sympathy with the problem confronting distinguished opposing counsel, has been dictated, in the last minutes permitted by the exigencies of printing after a reading of the briefs or portions of briefs thus far made available to counsel for petitioners, including a fifty-three-page typewritten draft of most of BRIEF FOR THE RESPONDENTS, a twenty-three-page typewritten draft of BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS, AMICUS CURIAE, and thirty-three-page printed BRIEF OF AMERICAN FEDERATION OF LABOR, AMICUS CURIAE. These briefs pay surprisingly little attention to the BRIEF FOR PETITIONERS, and are all organized on different bases, but in the main the authorties (which may conveniently be correlated with petitioners'

discussion thereof through the page references given in petitioners' table of citations) and contentions have already received adequate treatment in the BRIEF FOR PETITIONERS. Some reply on the following matters in these several excellent opposing briefs considered in their order of presentation may assist the court in its analysis and decision of the case presented. All agree on this, that the proper construction of Section 10(a) of the Labor Management Relations Act is determinative of the issue of state court jurisdiction presented.

A. BRIEF FOR THE RESPONDENTS CONSIDERED

The brief for the respondents presents five contentions after adverting to certain facts deemed favorable (and certain offers of evidence which are not before this court) without any discussion of the petitioners' statement or the countervailing evidence collected in petitioners' brief in Appendix A supporting the finding of fact by the state trial court as to the purpose of this picketing. Respondents' Point V on free speech is not, as we understand the petition for certiorari and this court's action in granting that petition, before this court, but has been thoroughly discussed by the state trial court (R. 193-196 and 227) and by the Pennsylvania Supreme Court (R. 231-232) and more recently in LOCAL UNION NO. 10, etc. v. GRAHAM, et al., —— U.S. ——, 73 S. Ct. 585. With reference to respondents' Point II dealing successively with federal outlawry and with federal protection as bases for preemption, we call attention to the discussion in Points I, II and III of BRIEF FOR PETITIONERS as to the intention of Congress to continue state court remedies for federally proscribed union activities, and we refer to the discussion under petitioners' Point IV and also Appendix in reply to respondents' claim of congressional protection as an alternative

basis for pre-emption. We proceed now to consider some matters appearing in Respondents' Points I, III and IV.

RESPONDENTS' POINT I
AS TO PRIVATE RIGHTS

Respondents in their Point I apparently accept the exposition and citation of authorities (except for some of the state court decisions which they attempt to distinguish at another point) under Point II of BRIEF FOR PETITIONERS and content themselves primarily with a contention that Petitioners fail to support their naked assertion that the rights which they claim are private in nature. Respondents further suggest, quite erroneously, that the source of the state court's authority, if it exists at all, is found as they word it in the legislative delegation to it to apply state sanctions to certain violations of the Labor Management Relations Act. Petitioners reply that the state court proceeded under the common law of torts. The private right may therefore be defined as a legally-protected interest for the invasion of which the law entitled the injured person to maintain an action. See Restatement of Torts, Sections 1, 7 and 775 and accompanying comments and the introductory note in Volume 4, including pages 94 and 95. The fountainhead of analysis, as explained in Frankfurter and Greene, The Labor Injunction, page 24, is Mr. Justice Holmes in his paper "Privilege, Malice and Intent," 8 Harvard Law Review 1, and in his opinion in PLANT v. WOODS, 176 Mass. 492, where the majority agreed with the dissent of Mr. Justice Holmes, then Chief Justice of Massachusetts, that the concerted activity of the defendants in threatening boycotts and strikes was "actionable unless justified." PLANT v. WOODS, 176 Mass. 492 supra, has been followed in Pennsylvania in such landmark decisions as ERDMAN v. MITCHELL, 207 Pa. 79, 93 and PURVIS v. UNITED BROTHERHOOD, 214 Pa. 348, 355,

359-360, so that the common law of Pennsylvania is clearly in accord with the Restatement of Torts, Section 775, that:

> "Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper."

The state trial court vindicated petitioners' private right thus established by the common law of torts as the law of Pennsylvania.

The only relevance of state labor relations legislation was that it, in accordance indeed with the constitutional law of Pennsylvania as declared in ERDMAN v. MITCHELL, 207 Pa. 79, 90-92, supra, had definitely set the face of the state law against the object of the picketing, and the purpose of the picketing was therefore not a proper object of concerted action. Or, as set forth in the Restatement of Torts, Section 794,

> "An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers."

There is in any event no suggestion in the opinions of the state trial court or of the Pennsylvania Supreme Court that there was any application of state sanctions to violations of the Labor Management Relations Act. We simply refer to the discussion of applicable public policy enunciated by the Pennsylvania State Labor Relations Act under Point IV of BRIEF FOR PETITIONERS. The Pennsylvania Labor Anti-Injunction Act to which respondents point was definitely not the source of the state court's authority. As set forth in the very case of ALLIANCE AUTO SERVICE, INC. v. COHEN, 341 Pa. 283, which respondents cite for the proposition that that act deals only with the

remedy of injunction, the Supreme Court of Pennsylvania stated (at page 288) that:

> ". . . the Labor Anti-Injunction Act does not declare the act as to which it prohibits the issuing of an injunction to be either legal or illegal, but merely denies the particular remedy of injunction in certain cases and restricts it in others * * *"

The 1939 amendments to that Pennsylvania act, which respondents quote in part, simply removed a barrier to that particular form of remedy, injunctive relief, for a long-continuing and never repealed common law cause of action in tort. The Pennsylvania Supreme Court wholly agreed (R. 232) with the relevant controlling statement of the trial court (R. 197, footnote 9) that

> "Section 4 of the Pennsylvania Labor Anti-Injunction Act of June 2, 1937, P. L. 1198, as amended by the Act of June 9, 1939, P. L. 302 (43 PS 206d) provides that the prohibition against injunction shall not apply in any case * * *
>
> '(b) Where a majority of the employes have not joined a labor organization, or where two or more labor organizations are competing for membership of the employes, and any labor organization or any of its officers, agents, representatives, employes, or members engages in a course of conduct intended or calculated to coerce an employer to compel or require his employes to prefer or become members of or otherwise join any labor organization'."

Plainly, then, respondents Point I is unsound and on the contrary the state trial court vindicated a private right within the plain and unambiguous meaning of FEDERAL TRADE COMMISSION v. KLESNER, 280 U.S. 19, AMALGAMATED UTILITY WORKERS v. CONSOLIDATED EDISON CO., 309 U.S. 261, and NATIONAL LICORICE CO. v. NATIONAL LABOR RELATIONS BOARD, 309

U.S. 350, over which the National Labor Relations Board had been delegated no jurisdiction with the result that the Labor Management Relations Act did not supersede such civil liability and the jurisdiction of state courts to vindicate such private rights under state law.

RESPONDENTS' POINT III AS TO LEGISLATIVE HISTORY

Strikingly enough most of the material marshalled in petitioners' Point I is apparently conceded, and is not even discussed by the tactical retreat in good order in respondents' Point III calling out that petitioners' purported analysis of the federal act and its legislative history is unsupportable. Respondents say things in this connection that betray how far they have withdrawn from the position occupied and fortified by petitioners. Respondents' exceedingly able counsel stays away from the congressional debates (except for conspicuously copious citations to the arguments against private injunctions in the federal courts, already documented and discussed at pages 32 to 36 of BRIEF FOR PETITIONERS), keeps away from the quite significant Conference Committee Report and presents no analysis of the language of the Labor Management Relations Act itself in Section 10(a). Noting this silent but eloquent tribute to their analysis in Point I of the Labor Management Relations Act and its legislative history, petitioners reply to the points discussed seriatim in the ten typewritten pages comprising respondents' Point III.

(1) Referring only to the Senate debates, and not to petitioners' analysis of Section 10(a) or the Conference Committee Report, respondents notice that some of the quotations in petitioners' Point I-A from that Senate debate are found in a context dealing with violence and mass picketing. But that context was the handiwork of the opposition and not of the overwhelming majority in the

Senate actually responsible for the equalizing amendments adding federal outlawry of unfair practices by labor organizations. It was the opposition that argued that this was an imposition of a double liability, and it was the opposition that took as its strongest illustration such matters of violence because they were unquestionably a violation of the state laws in every state. Of couse, in answering this loyal opposition on its own ground there are statements in the debates favoring two remedies even in those cases of violence and pleading for federal outlawry even of such universally unjustifiable conduct for the very purpose of encouraging local law enforcement and police action. The Supreme Court may well be encouraged to take a firm stand by the concession of this distinguished labor lawyer representing respondents that:

> 'Congress, in prescribing such Union conduct made it clear that such local police regulations remained unimpaired * * *"

The Senate majority, however, by no means limited their arguments to demolishing this stronghold of violence, illegal in every state, that the opposition had careefully chosen as the one point from which they could make their most effective attack on the equalizing amendments. Some of the very pertinent Senate debate going far beyond elementary cases of violence is referred to in BRIEF FOR PETITIONERS at pages 29 to 30, 32, and 122 to 126. Senator Taft referred to a specific case of coercion by threat of strike and to a specific case of attempted organizing from the top by picketing and Senators Ellender and Ball referred particularly to economic coercion by the Teamsters in California and Oklahoma cases. Even Senator Morse, to whom the opposition are fond of resorting for authority, said of Teamster picketing of an establishment in an effort to increase the Teamster membership (BRIEF FOR PETITIONERS, page 31) that:

"If such activity constitutes a violation of State law, as it apparently did in the case cited, there seems to be no occasion for adopting the amendment, and thus requiring the N.L.R.B. to correct the same abuse."

Congress nevertheless empowered the National Labor Relations Board to correct the same abuse by way of a public remedy in addition to and not in lieu of the absolutely necessary continuing remedies before state courts. The purpose was to make sure that there was some remedy and by no means to displace existing effective remedies. The Senate debates, then, cannot be ignored on respondents' undocumented say so, which is not so, that they were limited to matters of violence and local police regulations. The Senate recognized court remedies in any case covered by the equalizing amendments. There was no reason in the world, the debates make clear, and they bear careful reading and rereading, why there should not be two remedies, remedies before the state courts as well as before the National Labor Relations Board with its obvious limits for effective action. The Conference Agreement reflected and expressed this intention of Congress. Section 10(a) likewise recognized the continued existence of state court jurisdiction or any other means of adjustment or prevention as Congress expressly stated.

(2) Respondents' second contention in this connection dwells primarily upon the National Labor Relations Act of 1935 and thereupon contends that:

"No changes which are relevant here were made by the 1947 amendments."

The assumed premise as to the National Labor Relations Act of 1935 excluding labor injunctions and state court jurisdiction does not have any foundation either in the language of that statute (patterned after the Federal Trade Commission Act) simply empowering the National Labor Relations Board to prevent specified unfair labor practices

or in the congressional history. The congressional history includes the pertinent report of the Senate Committee of which Senator Walsh was chairman recognizing the adequacy and continuance of state labor injunctions in industrial disputes throughout the coutry. (BRIEF FOR PETITIONERS, page 54, also page 49 for the following). The congressional history also includes the express statement by Senator Walsh that

> "The courts will have in the future all the jurisdiction they have ever had in relation to all the differences which arise between employers and employees. * * *"

Senator Wagner likewise recognized the continued availability of injunctions issued by the thousands by courts all over the country.

The burden is therefore not upon the petitioners but upon the respondents to show that a change was made by the Labor Management Relations Act, otherwise state court jurisdiction continues. Oddly enough, as if anticipating the collapse of their own premise and assumption as to the 1935 legislation, respondents suggest or rather hint that the proviso in Section 10 (a) somehow accomplishes that revolution. That proviso, clarifying the power of the National Labor Relations Board, within the scope of its own limited delegated authority, to cede or concede state labor relations board jurisdiction on an industry-wide basis by agreement has been discussed, adequately we trust, in Section I-C, pages 40 to 47, of BRIEF FOR PETITIONERS. Respondents make a serious mistake, not borne out by the Congressional Record, when they rely on the supposition that in 1947 the question of federal and state authority in this fild was fully debated and every aspect of the problem was considered! By way of understatement we would ask that respondents produce the citations to any such debate. To the best of our

konwledge the proviso to Section 10 (a) providing for cession of jurisdiction to state labor relations boards was reported out favorably, with the approval of the minority members also, by the Senate Committee, ten days after the BETHLEHEM decision and was not debated on the floor of the Senate. The Conference Committee Report (BRIEF FOR PETITIONERS, pages 26 and 27) amply corroborates the intention of Congress, in using the language that it did use in Section 10 (a) in 1947, to continue state court jurisdiction under state law.

(3) General argument always gives counsel a lot of leeway and so respondents next argue a very general preemption intention and skip all over the Labor Management Relations Act in an effort to distill an amazing thesis that Congress took great care in each and every instance where it intended state action to spell it out in precise terms. On the contrary, as indicated by the taking of testimony as to specific abuses, by Senator Taft in his initial major speech, and at various points in the debates and committee report, Congress was intent on providing some remedy, to the extent that a federal or uniform remedy seemed practical and politic, for specfic labor union abuses that had been called to its attention. Its language is not understood as it was intended if read through the glasses of the maximum expressio unius. On the contrary, Congress left the fleece of verbiage expressing its intention where the longest thorns of specific abuses happened to impinge upon its sensibilities. That is our distinct impression from a laborious reading and rereading of all the debates, reports and testimony and all the provisions in the Labor Management Relations Act. We believe that the members of the court, if they can make the time to jump into that bramble bush several times, will see the same thing. Petro, in Participation by the States in the Enforcement and Development of National Labor

Policy, 5th Annual Conference on Labor, New York University (1952), pages 66to 68 and particularly at the end of footnote 145, comes to the same conclusion that

> ". . . the rest of the statute, tends to suggest that Congress was intent, not upon precluding state law generally, but only such state law as enlarged trade-union immunities to legal process."

Respondents point to Section 14 (b) in effect stating that the state may go beyond the Labor Management Relations Act in restraining the institution of compulsory unionism. As pointed out by Petro, supra, at pages 67 and 68, every one knows that the Eightieth Congress was particularly concerned with the subject of compulsory unionism; that potent forces were at work to outlaw the institution in all its forms; and that very much alive at the time was the quesion whether the National Labor Relations Act of 1935 had, by accepting all forms of compulsory unionism, precluded the states from outlawing any form. There was a proliferation of regulation heightening the probability of conflict between state and federal law on the same general subject matter, and in the case of conflict, which did thereafter occur, state law would have had to bow, unless Congress had expressly delegated authority to the states, as it did in Section 14 (b). As Petro, supra, at pages 67 and 68, states:

> "Thus the deliberate, express delegation of power to the states may be entirely explained by the spcial circumstances surrounding the grant: Strongly opposed to all forms of compulsory unionism but unwilling itself to reject the institution completely, Congress virtually encouraged the states to go all the way and at the same time precluded all doubt of the validity of additional state sanctions. If the doubts concerning the validity of further state action were not alive—as they were not in connection with all the

other subjects presently under discussion—and if the Congress were not so specifically aroused on the subject of compulsory unionism, the probability is that Section 14(b) would never have been written * * * Algoma (336 U.S. 301) * * * rather clearly weakens the argument that the section operates somehow to preclude all state regulation which goes beyond any of the other features of tthe Act."

Respondents also refer to Section 303(b) which permits damage actions "in any * * * court having jurisdiction of the parties" against the unlawful strikes and boycotts defined in Section 8(b) (4) (A) of the Labor Management Relations Act. As stated by Petro, supra, at page 66 in the first paragraph of Note 145,

"The specific grant of jurisdiction shows only that Congress was intent upon eliminating such strikes and boycotts from the industrial scene. In many states, the kinds of strikes and boycotts in 8(b) (4) (A) are not unlawful. Naturally, the courts in those states would accordingly afford no relief, except for the power granted by 303(b) ."

Any such search, throughout the act, for some general congressional intention should certainly not overlook, as respondents somehow have failed to see, Section 14(a). As explained in Senate Report No. 105 at page 28, Legislative History of the Labor Management Relations Act, page 434 (the Conference Agreement later adopting the provisions of this Senate amendment),

"This is a new section which makes it clear that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activi-

ties."

This provision strongly suggests that when Congress intended to exclude state action, and was intent upon declaring a uniform national policy which the states should not change, it said so, and knew how to say so. As moderately summed up by Petro in Participation by the States in the Enforcement and Development of National Labor Policy, New York University Fifth Annual Conference on Labor (1952), page 67, end of footnote 145,

> "On the whole it would appear that 14 (a), like the rest of the statute, tends to suggest that Congress was intent, not upon precluding state law generally, but only such state law as enlarged trade-union immunities to legal process."

Respondents, in addition to clutching at various straws in other sections of the Act, refer to the even more remote House Report No. 245, 80th Cong. 1st Sess., page 44, Legislative History, etc., 335, which concerned the very different House Bill that expressly made "exclusive" a much broader and more comprehensive piece of proposed legislation and at the same time wanted to make sure that numerous state right-of-work statutes or constitutional amendments could not be questioned. A more relevant statement of Congressional intention is found in the subsequent House Conference Report No. 510 at page 60, Legislative History, etc., page 564, stating that,

> "It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. * * * To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement in section 14(b), contains a provision having the same effect."

Without roaming all over the statute and through

superseded portions of committee reports, it may be concluded from the provisions of Section 10(a) and the relevant legislative history that it was never the intention of the Labor Management Relations Act to preempt the field of state court jurisdiction to vindicate private rights under state laws transgressed by union activity which the 80th Congress was so intent to see controlled that it added its equalizing amendments. Congress saw no reason why there should not be two remedies, both before the National Labor Relations Board with its limited powers and limited scope of effective action and before the indispensable state courts under state law. There was no broad preemption by abstract projection, of state court jurisdiction which could only have as its chief practical result the creation of a vacuum which Congress abhorred. The broad theory of preemption for which respondents here contend goes far beyond the decisions of the Supreme Court of the United States and the language and intention of a very practical, if not tough, 80th Congress that was convinced by voluminous testimony that there must be adequate remedies, and the more remedies the better, for certain abuses by some very powerful labor unions which at that session concerned Congress verey much.

(4) The one point where respondents come closest to the words of the statute is in their strange concentration of interest in explaining away the absence of a word no longer found in Section 10(a). Respondents completely miscoceive petitioners' position in misstating that

> "They contend that the deletion of that word (exclusive) constituted a grant of authority for state court to act in this case."

The three typewritten pages devoted by respondents to a valiant effort to explain that Section 10 (a) should be read as though it had not deleted the word "exclusive" falls by the wayside while the good ground for profitable thinking

as to the deletion of the word "exclusive" is still to be found in Section I-D, pages 48 to 60 of BRIEF FOR PETITIONERS. When respondents refer to portions of the House Conference Report No. 510, 80th Cong., 1st Sess., page 52, Legislative History, etc., page 556, for reasons why the word "exclusive" was deleted, they somehow falter from sheer exhaustion without completing the entire paragraph of that Conference Report completely expressing the congressional intention, as quoted in full at pages 56 and 57 of BRIEF FOR PETITIONERS. That paragraph does start out by stating two of the reasons for deleting the word "exclusive." The word "exclusive" had been omitted in the Senate amendment which had provided in Section 301 for suits against unions on collective bargaining contracts and in Section 10(j) for temporary injunctions in federal court upon petition of the National Labor Relations Board. Section 301, however, was enacted by Congress mainly because not all the states had made unions suable entities and there was no intention to preclude state court jurisdiction over suits for violation of collective agreements, as the courts have since held. By contrast, Congress deleted a proposed provision that violation of collective bargaining agreements be an unfair labor practice. Section 301, then, is far from a full and complete explanation as to why the word "exclusive" was deleted. Likewise, the matter of temporary injunctive relief upon petition of the Board in federal court cannot be the full explanation in view of the statement, five pages later, in the same conference report, at page 57, Legislative History, etc., page 561, that

> "The power of the Board under this provision will not affect the availability to private persons of any other remedies they might have in respect to such activities."

The complete explanation then must be found by completing a reading of the full paragraph of the House Conference Report at page 52. That paragraph goes on to point out

that when the word "exclusive" found in the House Bill was deleted, the Senate substituted language providing that the Board's power shall not be affected by other means of adjustment or prevention. And then that paragraph of the House Conference Report goes on to give the reason for that substituted language. As a matter of logic, the reason for substituting the new language is quite as much an additional reason for deletion of the old language and of the word "exclusive." Thus, on a complete reading of this paragraph of the House Conference Report, we find that the word "exclusive" was deleted for the third and perhaps more important reason (and the language recognizing other means of adjustment or prevention substituted for the reason) that, as that pertinent paragraph of the House Conference Report concludes,

> "By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies."

For the foregoing reasons, we respectfully submit to the court, and suggest in all kindness to zealous counsel for respondents, that respondents' Point II must yield (whatever the merits of this hasty reply) before the carefully-supported, documented and reasoned analysis of section 10(a) of the Labor Management Relations Act and its legislative history in BRIEF FOR PETITIONERS, Point I. That point is in itself a sufficient reason for reversal of the Pennsylvania Supreme Court and for sustaining of the state court jurisdiction to which Congress consented.

RESPONDENTS' POINT IV
POTENTIALS OF CONFLICT

Again, respondents appear to concede most of petitioners' argument. They doubt, however, the capacity of the National Labor Relations Board to police any abuses by state courts, should such occur. They contend that:

> "The Board is simply not geared, in manpower or otherwise, to act as a supervising agent over the myriad state courts throughout the country."

Respondents are apparently not aware that they are thereby holding themselves on their own petard. If the Board is not in position to supervise the work when actually being done by responsible state courts, how can the Board go much, much further and do the work itself? It is that very limitation of effective federal action which so impressed Congress that Congress was insistent upon the continuation of state court remedies for labor union abuses that the 80th Congress in its wisdom felt must be remedied. Petitioners accordingly suggested, on their reading of the Act and the legislative history, that the Board, although it could not possibly do the work itself, should be in position, either by providing its own paramount remedy in the public interest or by appropriate injunction proceedings in the federal court, to supervise the very necessary work of state courts.

Respondents are so concerned about the incapacity of the National Labor Relations Board because, in delicate nuances, they level a serious charge on the basis of "superficial observation" that abuses are supposed to have occurred in "scores of recent decisions of state courts throughout the country in picketing cases * * *" Anyone who makes such a serious charge should be prepared to stand up and be counted, and to document the charges. Respondents are here taking issue, not so much with counsel for petitioners (BRIEF FOR PETITIONERS, pages 35

and 94), as with the results of a careful congressional investigation of state labor injunctions. In referring to this congressional investigation, we first note that the 80th Congress, with the intention of which we are here concerned, felt no need even for such an investigation. The then Secretary of Labor, Schwellenbach, himself testified that in his rather broad experience he had met with no glaring cases such as had been previously collected by Frankfurter and Greene in their serious study of The Labor Injunction. The 80th Congress did not therefore go beyond the materials and testimony in the hearings before its responsible committees and instituted no investigation of state labor injunctions, but on the contrary in its Conference Report emphasized the maintenance of the status quo; while there was no change in the Norris-LaGuardia Act limiting federal court injunctions at the suit of private parties, there was likewise no change in the status quo in the states. The Conference Report expressly explained that the action of the 80th Congress in making available to the National Labor Relations Board preliminary injunctions in the federal courts did not affect the availability to private parties of any other remedies they might have with respect to union conduct. We respectively rest, not on personal wisdom, but on the wisdom of Congress and of careful scholars in this field as reflected in Senate Document 7, 82nd Cong. 1st Sess. entitled STATE COURT INJUNCTIONS, being the report of the subcommittee on labor management relations of the committee on labor and public welfare of the United States Senate as presented by Senator Murray on February 8 ,1951. That responsible study is not in accord with the heated charge of respondents, in the ardor of advocacy, that

> "Rights guaranteed by Section 7 of the Act are being wholly ignored and vitiated every day."

Congress has thus far adhered to the recommendation set

forth in the staff report to the subcommittee on labor and labor-management relations of the committee on labor and public welfare of the United States Senate, 82nd Cong. 2nd Sess. (Government Printing Office, 1953), page 34, that:

> "Self-restraint on the part of State courts is the most promising cure for the improper use of labor injunctions."

There is good reason for that position because as suggested in that same staff report, page 34,

> "Our Federal system is based upon a distribution of authority which both insures equal treatment for those similarly situated throughout the Nation and utilizes local government to the maximum. This promotes responsibility in local government. Local regulation is often more acceptable than intervention by the central Government."

We do not share the respondents' lack of confidence in state court judges, men who are the cream of the land and very responsible representatives and administrators of justice in their respective communities. When respondents attempt to bolster their charges against state court judges in general by suggesting that they are often "unacquainted with the intricate problems of construction of the Act" they miss the mark in this case of state court jurisdiction to vindicate private rights under state law with which state court judges are very well acquainted.

By way of contrast, what do respondents suggest that the National Labor Relations Board should or would have done in this case? The respondents make the very interesting revelation that the National Labor Relations "Board does not have the facilities to take action. In the instant case, its aid was informally sought by the Union when the case was being appealed to the State Supreme Court. We were told that the Board was simply unable to undertake the policing of the many such cases at the state level." If

the respondents were so sure that this was a matter for the Labor Relations Board, or that their fundamental rights were being impaired, why did not they institute proceedings before the National Labor Relations Board?

Dire consequences there would have been to petitioners had not the state trial court exercised jurisdiction to vindicate their private rights. The status quo was very properly preserved, although even then a temporary or preliminary injunction was issued only after ten long, long days, and answer by the Teamsters, and examination and cross examination of witnesses on both sides. In such a period of time a man's small business or means of livelihood can be utterly destroyed by the terrifying power of the Teamsters over the truck transportation which constitutes the life blood for petitioners' means of livelihood, as indeed of much of the economic life of this nation to an amazing extent. How has the union, of the powerful Teamsters, been hurt? This was not a case of strike breaking by injunction. This was a case of organizing from the top where the Teamsters were determined to add to their membership, even if they had to force the employer to do their own organizing for them, men who had not been sold on the Teamsters and did not choose to join the Teamsters. Should the serious question of state court jurisdiction here presented be resolved in accordance with the contentions of the Teamsters, they can immediately resume picketing. They have been at the job some fifteen years and have shown no harm to them, much less any harm comparable to that which would have been inflicted upon the petitioners had no injunction been granted, during the period of time that the several state courts wrestled resolutely with the very serious question which is now before the Supreme Court of the United States for ultimate resolution.

The desire of the Teamsters for freedom to exercise their terrific economic power, untrammeled by state laws

administered by state courts and without too much attention from a too busy National Labor Relations Board is understandable. The legislative considerations advanced by petitioners have this very year been brought to the attention of responsible committees of the 83rd Congress by representatives of the Teamsters as well as by representatives of a textile union whose unsuccessful southern organization campaign had on several occasions passed the bounds of applicable state law. Judgment on such matters is a matter for the Congress and if Congress is convinced that what the respondents and the Teamsters generally claim is so, no doubt Congress will take appropriate action. What that appropriate action should be is a matter for Congressional consideration. The staff report to the Senate subcommittee on labor and labor management relations, 82 Cong. 2d Sess. (Government Printing Office, Washington, 1953) entitled STATE LABOR INJUNCTION AND FEDERAL LAW, has suggested that primary consideration might well be given to the following remedy:

> "The Congress should prescribe procedural rules such as those in the Norris-LaGuardia Act for State court injunction cases involving enterprises affecting intrastate commerce."

It should be sufficient for the Supreme Court of the United States to say that, while bills to limit state court jurisdiction in labor disputes affecting interstate commerce have been introduced, Congress has thus far not seen fit to prescribe any remedy, much less to abolish such jurisdiction, there being important countervailing considerations of policy for not throwing out the baby with the bath. Accordingly, the Supreme Court cannot affirm on the basis of the "observation" and charges set forth in Respondents' Point IV but, on the contrary should reverse for the reasons set forth in petitioners' Point III, if indeed the decision is not grounded on petitioners' logically prior contentions

or points I or II.

That is as much as petitioners have seen of BRIEF FOR THE RESPONDENTS and thus is the limit of this printed reply thereo.

B. BRIEF OF AMERICAN FEDERATION OF LABOR, AMICUS CURIAE, CONSIDERED

With the consent gladly given of petitioners, the American Federation of Labor has filed as amicus curiae a brief supporting the position of its powerful affiliate, the Teamsters. This brief, making many of the contentions likewise advanced by respondents, starts out with an initial proposition like the respondents' first point that petitioners asserted rights are public rather than private, (and petitioners reply as to that accordingly need not here be repeated), adds a second point contending for preemption even of private rights and then as a third point proceeds to propound an affrmative answer to the assumed "ultimate question" whether Congress intended to exclude "state action" in a particular field in which Congress had power to legislate. Under this third point the A. F. of L. considers first part of the statutory language, then resorts to presumption and rationales and finally calls attention to a small portion of the Legislative History concerned with congressional maintenance of the status quo under the Norris-LaGuardia Act restricting private injunctions in the federal courts. Petitioners accordingly reply, seriatim to the A. F. of L. points II, III-A, III-B, and C, and III-D in four corresponding steps.

A. F. OF L. POINT II, PRE-EMPTION OF PRIVATE RIGHTS

In approaching this contention of the American Federation of Labor that Congress has regulated respecting

petitioners' rights, even if they are private rights, petitioners disclaim the concession which the A. F. of L., at page 3, would amazingly impute to them that if the state-granted rights they here seek to vindicate are public in nature, the state court had no jurisdiction. Any such assumption would tend to suggest that the American Federation of Labor has read Point II of petitioners' brief but has not read Point I. Whatever the nature of the rights, so long as they are state-granted rights, the state courts may vindicate them with the blessing and consent of Congress as pointed out in the discussion under Point I in BRIEF FOR PETITIONERS. It is also noted that at page 12 (see also page 15) the A. F. of L. recognizes that Congress has delegated to the National Labor Relaitons Board authority only to protect public rights and has not created a "private administrative agency" for the enforcement of private rights. With these preliminary observations, petitioners reply to PLANKINTON PACKING CO. v. WISCONSIN EMPLOYMENT RELATION BOARD, 338 U.S. 953, by referring to the discussion in BRIEF FOR PETITIONERS, particularly at pages 8 8to 90 under Point III, a point reached only if petitioners' Points I and II are both decided adversely to petitioners. As to the ensuing reliance of amicus curiae at page 8 on INTERNATIONAL UNION, etc. v. O'BRIEN, 339 U.S. 454, reference is made to the discussion in BRIEF FOR PETITIONERS at page 97 and footnote 20. Had amicus curiae completed the quotation from O'BRIEN by quoting also the very relevant immediately-preceding sentence, it would be quite apparent that the Supreme Court is very circumspect when it talks in terms of preemption or occupancy of the field and referred in that case only to occupancy of the limited field of "peaceful strikes for higher wages." To the extent that amicus curiae interweaves at pages 7 and 8, some reference to AMALGAMATED, etc. v. WISCONSIN EMPLOYMENT RELATIONS BOARD, 340

U. S. 383, reference is made in reply to BRIEF FOR PETITIONERS, pages 98 and 99. Amicus curiae even clutch at a dictum in the case of CALIFORNIA v. ZOOK 336 U.S. 725, at 732, where the actual decision as suggested in BRIEF FOR PETITIONERS at page 83 strongly supports petitioners' position. The dictum was that Congress in the Taft-Hartley Act said that "state enforcement mechanisms" helpful to federal officials were excluded. The dictum thus has reference to "state enforcement mechanisms" and not to state court jurisdiction to adjudicate rights under state law. The dictum is by Mr. Justice Murphy, who had indicated his opinion of the helpfulness of stat elabor relations boards as enforcement mechanisms in BETHLEHEM STEEL CO. v. NEW YORK STATE LABOR RELATIONS BOARD, 330 U.S. 767, 777, 783, where he joined with Mr. Justice Frankfurter and Mr. Justice Rutledge in a separate opinion pointing out that:

> "Accordingly, the National Labor Relations Board, instead of viewing the attempt of State agencies to enforce the principles of collective bargaining as an encroachment upon national authority, regards the aid of the State agencies as an effective means of accomplishing a common end * * * In the submission by the Board before us, we have the most authoritative manifestation by national authority that State collaboration would be a blessing * * *"

It was precisely ten days after that separate opinion and that decision that the Senate introduced the proviso to Section 10(a), to which this dictum of Mr. Justice Murphy may be construed to refer, to clarify the law and support that separate opinion so as to authorize the National Labor Relations Board, with certain limitations, to enter into compacts or agreements with state labor relations boards as helpful "state enforcement mechanisms" (see BRIEF FOR PETITIONERS, page 43 and related discussion under

Point I-C). We cannot see, therefore, that the dictum is so "directly in point" as amicus curiae fondly hopes with the blindness of love at first sight. In addition, in that ZOOK case a California statute prohibited the sale or arrangement of any transportation over the public highways of that state if the transporting carrier had no permit from the Interstate Commerce Commission, the Federal Motor Carrier Act had substantially the same provision, and the respondents, operating a travel bureau in Los Angeles were prosecuted under the California statute and convicted; the Supreme Court of the United States upheld that conviction and, despite a strong plea as to double liability suggested that the state remedy constituted

> "... aid of particular importance in view of the I.C.C.'s small staff."

It follows from that decision that Pennsylvania's attempt to deal with a real harm to its residents had not been displaced by the Labor Management Relations Act since, paraphrasing the last two sentences in CALIFORNIA v. ZOOK, supra, the state may vindicate private rights under state law through its courts for the welfare of its inhabitants while the nation through the National Labor Relations Board may provide a remedy for the welfare of interstate commerce, and there is no conflict.

The remainder of Point II of amicus curiae was apparently written without paying any attention to BRIEF FOR PETITIONERS, particularly pages 72 and 73 or even the summary, particularly page 18. Might we be far wrong in drawing an inference that the distinguished but very busy counsel for amicus curiae has simply drawn from his prior brief in the case where this court later decided that the writ of certiarari had been improvidently granted, where Mr. Thatcher argued, we are assuming as he argues here, that a number of state court decisions hold that state courts have no jurisdiction to grant relief for alleged viola-

tions of the Taft-Hartley Act (at page 8). Whatever the merits of that position, that is not this case, where the state court explicitly (to the extent of holding hat the Labor Management Relations Act did not apply) acted under state law.

Other decision of the Supreme Court of the United States may be found more analogous on this second point of amicus curiae as to state court jurisdiction over private rights.

There comes to mind the upholding of state court jurisdiction in PENNSYLVANIA RAILROAD COMPANY v. PURITAN COAL MINING COMPANY, 237 U.S. 121, 35 S.Ct. 484, where the plaintiff coal company recovered a substantial verdict against a railroad which failed to supply sufficient cars, in violation both of state law and of the Interstate Commerce Act, for transportation of bituminous coal during a period of unusual demand incident to the 1902 anthracite coal strike. In affirming, this court, through Mr. Justice Joseph Lamar, recognized that Section 9 of the Interstate Commerce Act even provided for a private remedy before the Interstate Commerce Commission while giving the shipper an option to proceed in the federal courts, stated that (at page 486) so far as rights under the Interstate Commerce Act were concerned

> "The express grant of the right of choice between those two remedies was the exclusion of any other remedy in the state court"

and yet affirmed and ruled (at page 488) that:

> "In the present case the pleadings contained no reference to the commerce act. The damages grew solely out of the fact that the Puritan Company failed to receive the number of cars to which it was entitled. * * * The Puritan Company was entitled to recover because of the fact that the carrier failed to comply with its common-law liability to furnish it

with a proper number of cars. What was a proper supply was a matter of fact."

From that decision it follows a fortiorari that where the National Labor Relations Board has been delegated no authority whatsoever over private rights, a state court likewise has jurisdiction to adjudicate a common law liability or to vindicate a private right under state law.

Our consideration of Point II of amicus curiae but strengthens the force and relevance of Point II in BRIEF FOR PETITIONERS that Congress has delegated to the National Labor Relations Board no authority to adjudicate private rights and has not entered this field where state court jurisdiction therefore continues.

POINT III-A OF A. F. OF L., THE STATUTORY LANGUAGE

For reply to this point of amicus curiae, pages 12 to 21, petitioners refer to Point I of BRIEF FOR PETTITIONERS. Amicus curiae refers primarily to the proviso for ceding of jurisdiction to state labor relations boards discussed in detail in Point I-C of BRIEF FOR PETITIONERS and recognizes (at page 15) that it is the language of Section 10(a) which is determinative of the issues in this case. Amicus curiae also refers (at pages 16 and 17) to various other subdivisions of Section 10 more relevant to a case which that counsel had formerly argued from the viewpoint of state court jurisdiction to enforce the Labor Management Relations Act itself. Going on and on, amicus curiae at page 18 refers to Section 14(b) just as respondents had done and then inadvertently quotes from House Report No. 245, 80th Cong., 1st Sess., page 40, a statement at the time applicable to the then House bill which expressly made the power of the Board in terms "exclusive," but the Senate and the Conference Committee Report changed that. Amicus curiae then spends a page on the

deletion of the word "exclusive" from Section 10(a), to which respondents had also adverted, as we have seen and closes by referring fully and fairly, albeit with some difference in emphasis, to the report of the Conference Committee (compare BRIEF FOR PETITIONERS, inter alia, pages 26 and 27 and 56 and 57). In the light of Point III-A of amicus curiae, petitioners' Point I is quite sound. Amicus curiae mentions (at page 15) and even italicizes the important second sentence of Section 10(a) but holds it off with a ten-foot pole and doesn't discuss it and immediately shifts to a discussion of language that does not now appear in Section 10(a). The statutory language, then, make clear, as does the Conference Agreement, that Congress has consented to the continuance of other mans of adjustmnt and of existing remedies before the courts.

POINTS III-B AND III-C OF A. F. OF L., PRESUMPTIONS AND POLICY

This amicus curiae further contends in Point III-B that the fact that Congress has specified certain remedies presumes that it has excluded all others (a contention more pertienent to a case like GERRY of CALIFORNIA) and cities dissenting views in CALIFORNIA v. ZOOK, 336 U.S. 725, so that the majority opinion and decision of the court in that case may be rested upon as a sufficient reply. Point I of BRIEF FOR PETITIONERS further shows that Congress has consented to state court jurisdiction. Point III-C of amicus curiae is a curious portrayal of the National Labor Relations Board "reduced to a state of idle impotency." That has not yet occurred, during the long period of time when state courts have generally exercised jurisdiction under state laws in such cases as this. How can this argument of amicus curiae be reconciled with arguments suggested by respondents that the board, even while state

courts are exercising jurisdiction, is too busy to police local situations?

POINT III-D OF A. F. OF L. LEGISLATIVE HISTORY

At pages 25 to 32 this amicus curiae refers only to debates in connection with the Senate rejection of the House's provision for private injunctions in the federal courts. For reply reference is made to BRIEF FOR PETITIONERS, pages 32 to 34, also 35 and 36. Even in the quotations selected by amicus curiae, it is apparent that the argument was for maintaining the status quo, as to the federal courts alone under discussion by not opening up the Norris-LaGuardia Act. These distinguished senators were talking about what they were thinking about, the federal courts, and when the House yielded on this point it insisted upon an express stipulation in the Conference Report that the limiting of federal court injunctions to a prerogative of the Board would "not affect the availability to private persons of any other remedies they might have in respect to such activities."

C. BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE CONSIDERED

This refreshing bit of original thinking, submitted to us on schedule in a typewritten draft, has now arrived in printed form. Appendix B of this C. I. O. brief sets forth our argument before the Pennsylvania Supreme Court, which that court rejected after careful consideration, that Section 8 (b) (2) should be construed as narrowly as the facts in the five cases thereunder upon which Teamsters had relied for their assertion that Section 8 (b) (2) applied. Indeed our oral argument before the Pennsylvania Supreme Court focused on that point, and this may ex-

plain some of the very apparent oversights, thus contributed to by cousel, of the Supreme Court of Pennsylvania. very strong court that it is. The petition for re-argument did go further but was perhaps an inadequate substitute for oral argument before the Pennsylvania Supreme Court on the crucial issue now presented to the Supreme Court of the United States for decision. At the same time this explains why we have leaned over backward, where the Supreme Court of Pennsylvania squarely decided against us, after full oral argument, on the scope of Section 8 (b) (2); we have therefore deliberately narrowed the issue, on the basis that Section 8 (b) (2) does apply, so as to strike at the jugular, as Holmes himself has advised should be done, on the remaining controlling issue.

The Supreme Court of the United States is of course not bound thereby, and has the final word as to whether or not Section 8 (b) (2) does apply as the Supreme Court of Pennsylvania held. If the Supreme Court of the United States should decide to follow the view, for which the C. I. O. here argues, that Section 8 (b) (2) does not apply (or as suggested by amicus curiae at page 14 applies "only where the union insisted on the inclusion of a clause in a contract with an employer which would violate Section 8 (3)"), then the Supreme Court could very simply reverse the Pennsylvania Supreme Court on the basis of settled principles re-affirmed in INTERNATIONAL UNION, etc. v. WISCONSIN EMPLOYMENT RELATIONS BOARD, 336 U. S. 245. It is the C. I. O. and not petitioners suggesting that easy way out.

What the C. I. O. is really up to after a long build-up (with various points to which our disagreement sufficiently appears from BRIEF FOR PETITIONERS and prior phases of this reply brief) is to undermine INTERNATIONAL UNION, etc. v. WISCONSIN EMPLOYMENT RELATIONS BOARD, 336 U. S. 245, and to ask nothing

less than that (at page 18)

". . . this court should specifically overrule that case."

The startling suggestion of the C. I. O. (at pages 17 and 18) specifically stated in the language of amicus curiae is that

> "We believe that if the decision of this Court in Automobile Workers v. Wisconsin E. R. B., 336 U. S. 245, be construed as establishing an area between the protected activities on the one hand and forbidden activities on the other, in which the states are free to apply their own labor relations policy, this Court should specifically overrule that case."

There is nothing novel in the necessary recognition that there is an area of employee activity which is neither proscribed nor protected by the National Labor Relations Act or by the Labor Management Relations Act. In the matter of PERRY NORVELL COMPANY, 80 N. L. R. B., 225, 241, in 1948, the National Labor Relations Board took pains to point out that a great deal of confusion in the arguments of counsel, including General Counsel, in that case, stemmed from their failure to distinguish between unprotected activities of employees on the one hand and unfair labor practices by labor organizations on the other and clearly re-affirmed the proposition established by its own prior decisions, by decisions of the Supreme Court of the United States and by the Conference Committee Report explaining the Labor Management Relations Act that

> "There is an area of employee activity, not precisely defined which, while not constituting unfair labor practices under Section 8 (b) of the Act, is nevertheless not protected by the Board when employees seek affirmative relief themselves under Section 8 (a). This doctrine was evolved by the courts and Board under the Wagner Act. Although some

employee conduct previously denominated as 'unprotected' has been made an unfair labor practice when committed by a labor organization or its agents * * * the doctrine that some conduct by employees may be unprotected, although not amounting to unfair labor practices, has retained its full vigor under the Labor Management Relations Act, 1947.'"

This well-established principle and fact as to the terms of the Labor Management Relations Act was authoritatively and decisively re-affirmed, in 1949, in INTERNATIONAL UNION, etc. v. WISCONSIN EMPLOYMENT RELATIONS BOARD, 336 U. S. 245, 253-254, where this court speaking through Mr. Justice Jackson, in a complete and carefully-reasoned opinion, stated, inter alia, that:

"Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied. * * *

"It seems to us clear that this case falls within the rule announced in ALLEN-BRADLEY (315 U. S. 740, 749) * * * because 'Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board.'"

That is sound doctrine ,and there was no dissent as to the principle, all of the justices having joined in recognizing the rule in ALLEN-BRADLEY. The dissenting opinions were concerned with the application of the principle in that the dissenting justices viewed the particular activities there involved as protected activities. The C. I. O. in its amicus curiae brief here now advances its theory that there should have been a dissent also as to the application of the principle on the other side, in that the C. I. O. now has a theory that the conduct there involved was (by Sec-

tion 8 (b) (3) of the Labor Management Relations Act forbidden.

The decision, strengthened indeed by such dissents, stands. There is undeniably an area between the protected activities on the one hand and forbidden activities on the other. Congress wasn't dealing in the kind of logic now employed by the C. I. O. in drawing two hemispheres of protected activities and forbidden activities that covered the whole world of union activities. The only result of such impractical logical activities would be to exclude the states, the result for which the C. I. O. understandably hopes, but Congres wasn't interested in that. Congress was interested in enlarging the forbidden activities. Congress was also interested, understandably enough at the same time, in restricting the protected activities which were its inheritance in Section 7 of the National Labor Relations Act of 1935. It said in express words that there were limitations on the right to strike. It said in express words that there was a right to refrain from concerted activities. It is very plain from the language, history and purpose of the Labor Management Relations Act and the pertinent decisions that there is an important tertium quid of unprotected activities of employees beyond the scope of the specific unfair labor practices by labor organizations which Congress specified in Section 8 (b).

It necessarily follows (see also the authorities cited in BRIEF FOR PETITIONERS, page 62 and footnote 12), as re-affirmed in INTERNATIONAL UNION, etc. v. WISCONSIN EMPLOYMENT RELATIONS BOARD, 336 U. S. 245, that in the important area between the protected activities on the one hand and forbidden activities on the other over which the National Labor Relations Board has been delegated jurisdiction under the Labor Management Relations Act, the states are free to apply their own labor relations policy. Such conduct is govern-

able by the state or it is entirely ungoverned. In that area the state labor relations boards may act. In that area, a fortiorari, state courts may adjudicate private rights under state law.

After everything so well said by the opposing briefs of our formidable adversaries has been carefully considered, whether there was opportunity to mention it in the foregoing reply or not, we ask that, for one or more of the reasons stated in this REPLY and in BRIEF FOR PETITIONERS, the Supreme Court of the United States uphold state court jurisdiction under state law.

Respectfully submitted,

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Of Cousel for Petitioners